

Nadler Reasserts Necessity for Special Counsel on Torture

Tuesday, 04 August 2009

NEW YORK, N.Y. – Today, Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, reiterated the urgent and unequivocal need for Attorney General Eric Holder to appoint a special counsel to investigate torture committed by the Bush administration. This special counsel would be charged with investigating and, if warranted, prosecuting the authorization and practice of torture on detainees. Encouraged by media reports that the Attorney General is considering such an appointment, but concerned that the investigation might exclude high-ranking Administration officials and lawyers who may have authorized torture and who, therefore, may bear the greatest responsibility for its use, Nadler sent Attorney General Holder a letter outlining why there is no alternative to a special counsel charged with investigating all those who may have authorized or carried out interrogation methods that amounted to torture.

“I welcome the news reports of the possible appointment of a special counsel, but I am fundamentally concerned that the scope of the special counsel investigation will be too narrow,” said Nadler. “There simply is no legal, moral or principled reason to insulate those who authorized the torture of detainees, either through legal reasoning or other policy directive, from investigation. This country has been instrumental in establishing the principle that high-ranking officials and lawyers who use legal reasoning to justify or otherwise authorize war crimes can, and should, be held legally accountable. The ban on torture is absolute and we have a legal obligation to investigate torture and all of those who may have been party to its use.”

Text of the letter follows below, and as pdf attachment (with footnotes):

August 4, 2009

The Honorable Eric Holder

Attorney General of the United States

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530

Dear Mr. Attorney General:

I am encouraged by news reports indicating that you are leaning toward appointing a special counsel to investigate credible allegations regarding the torture of detainees held in connection with counter-terrorism operations in the aftermath of the September 11, 2001 terrorist attacks on the United States. Earlier this year, I and several of my colleagues on the House Judiciary Committee asked that you take this step, a request we had also made of your predecessors. In our letter of April 28, 2009, we urged you to ensure an independent investigation into whether federal criminal laws were violated by individuals who authorized or participated in the interrogation of detainees, including high-ranking officials and lawyers from the Department of Justice itself who allegedly approved or ordered the use of enhanced interrogation techniques that amounted to torture.

While I welcome the news reports of a possible special counsel, I am concerned that these same reports indicate that you may limit the scope of the special counsel investigation to “activities by interrogators, working in bad faith, that fell outside the ‘four corners’ of the legal memos” provided by lawyers from the Office of Legal Counsel of the Department of Justice. I have two fundamental concerns with any investigation that is so limited. First, such an investigation would fail to consider the possible violation of laws by high-ranking officials and lawyers who, through legal advice or otherwise, may have authorized torture. As we noted in our April 28th letter, the Geneva Conventions obligate High Contracting Parties such as the United States to investigate and bring before our courts those individuals “alleged to have committed, or to have ordered to be committed” grave breaches of those Conventions. The War Crimes Act, 18 U.S.C. § 2441, specifically identifies torture and cruel or inhuman treatment, as well as the conspiracy to commit those acts, as punishable war crimes. The federal Torture Statute, 18 USC § 2340A, criminalizes torture and the conspiracy to commit torture.

This country has been instrumental in establishing the principle that high-ranking officials and lawyers who use legal reasoning to justify or otherwise authorize war crimes can, and should, be held legally accountable. Here, there are many unanswered questions regarding the conduct of OLC lawyers in reaching legal conclusions that have been almost universally criticized as deeply flawed, and that may, in fact, have been deliberately engineered to provide legal cover for conduct that this nation previously recognized and prosecuted as torture. Equally troubling questions remain regarding the involvement of high-ranking officials in the development of the legal rationale to support enhanced interrogation methods, and the authorization of general and individualized interrogation plans. There simply is no legal, moral, or principled reason to insulate those who authorized the torture of detainees, either through legal reasoning or other policy directive, from investigation, and I urge you to ensure that the scope of investigation is sufficient to include the lawyers and high-ranking officials who may bear the greatest responsibility for the alleged torture and mistreatment of detainees. It may be that no legal liability will be found on the part of these people, but to exclude their conduct, a priori, from the scope of an investigation would be contrary to the fundamental legal principles noted above.

Second, I am also troubled that the scope of the investigation may exclude from the outset individuals somehow deemed to have relied in good faith on OLC legal advice. The ban on torture is absolute: “no exceptional circumstances whatsoever . . . may be invoked as a justification of torture,” and “an order from a superior officer . . . may not be invoked as a justification of torture.” We have long embraced the bedrock principle that an individual’s responsibility to follow the law is not extinguished simply because someone else — even when that someone is a superior officer, high-ranking government official, or lawyer — authorizes them to commit an unlawful act, whether through order, policy directive, or legal advice.

It may prove true that some interrogators faced difficult choices — pressure from superiors to obtain intelligence information from detainees coupled with directives or advice indicating that harsh interrogation methods were lawful — but limiting the scope of investigation to exclude individuals up front ignores the absolute bar on torture and our legal obligation to investigate torture, and is not necessary. If, indeed, laws were violated, the Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd-1, provides a limited defense for those interrogators who show that they relied in good faith on legal advice in using interrogation methods that they did not know, and that a reasonable person would not know, were unlawful. These determinations are necessarily fact-based, and making ultimate decisions as to what the facts might prove or disprove, before any independent investigation has occurred, is unwarranted and would undermine the credibility of any investigation.

I appreciate and share the desire to put this unfortunate chapter in our nation’s history behind us, but we cannot do so without fulfilling our legal and moral obligation to investigate whether laws were broken by those who conducted and those who authorized the enhanced interrogation practices. I therefore urge you not to limit the scope of an investigation to those somehow deemed to have conducted the interrogations in “bad faith,” and reiterate our request that you appoint a special counsel who is fully authorized to investigate all violations of federal criminal laws related to the authorization and use of interrogation techniques for detainees held in the effective custody or control of the United States in connection with counter-terrorism operations or armed conflicts in the aftermath of the September 11, 2001 terrorist attacks.

Given the importance of this issue, I look forward to a response at your earliest convenience.

Sincerely,

Jerrold Nadler

Chairman

Subcommittee on the Constitution, Civil Rights, and Civil Liberties Committee on the Judiciary